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No. 80-2110

IN THE

Supreme Court of the United States

October Term, 1980

BIAGIO PINTO, a/k/a BOB PINTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Factual misstatements and legal distortions in the Brief for the United States in Opposition necessitate this brief Reply.

1. The Government attempts to confuse this case with two cases involving illegal sentences in which this Court recently denied certiorari. *McClain v. United States,* 643 F. 2d 911 (2d Cir.), *cert. denied,* No. 80-6536 (June 8, 1981); *United States v. Busic,* 639 F. 2d 940 (3d Cir.), *cert. denied,* No. 80-6379 (June 8, 1981). In *McClain* and *Busic,* the trial courts had imposed consecutive prison terms on multiple counts; these sentences were illegal because the indictment in each case charged a single offense for which there could be only one lawful punishment.

When a single offense has been improperly fragmented into multiple counts and an aggregate prison sentence has been imposed by cumulating consecutive terms on the separate counts, none of the component sentences necessarily survives a determination that the separate counts merge into a single offense.[1]

The present case does not involve a single offense, and the sentences imposed on each of the two convictions were entirely legal. The two crimes do not merge. Neither is a provision for enhanced punishment for an aggravated form of a basic offense. The statutes involved are wholly unrelated sections of the federal criminal code. If petitioner had received consecutive prison sentences on the two counts, there would have been no basis to challenge the aggregate sentence as a matter of law.

It is a gross disservice to this Court for the Government to assert that the distinction between this case and the illegal sentence cases is immaterial. In the relative obscurity of a footnote, the Government states:

> "While the false statement charge in this case may technically rest on an act separate from the initial fraudulent conversion of the funds, the entire prosecution here was based on essentially one course of conduct, which happened to violate more than one criminal statute." (Brief in Opposition, p. 7, n. 6).

1. Other decisions relied on by the Government are all in the same category. Two are bank robbery prosecutions in which the multiple counts were held to have merged. *United States v. Hodges,* 628 F. 2d 350 (5th Cir. 1980); *Johnson v. United States,* 619 F. 2d 366 (5th Cir. 1980). *United States v. Moore,* 540 F. 2d 1088 (D. C. Cir. 1976), was a 22-count conviction for dispensation of methadone; the multiplicity of counts was based upon evidence of 22 distributees. When the court of appeals concluded that the indictment was insufficient as to eight counts, it remanded for resentencing on the remainder. In *Kitt v. United States,* 138 F. 2d 842 (4th Cir. 1943), the sentencing court imposed twice the legal maximum term on each of four of the five counts.

The Government's argument-by-adverb—"technically," "essentially"—is remarkable. What the Government seeks to dismiss as a mere technicality, the difference between a sentence set aside because it is illegal and a lawful sentence, goes to the essence of the fundamental question presented to this Court.

2. The Government's argument that 28 U. S. C. § 2106, on a defendant's appeal from conviction, authorizes appellate review of a lawful sentence as too lenient is as audacious as it is wrong. Congress has authorized prosecution appeal from sentence in only one narrow situation under the Organized Crime Control Act of 1970; this Court upheld that provision in *United States v. DiFrancesco*, — U. S. —, 101 Sup. Ct. 426 (1980). If a district court imposes a sentence below the limits authorized by statute, the government may seek relief from a court of appeals by writ of mandamus. See *United States v. Denson*, 603 F. 2d 1143 (5th Cir. 1979). Otherwise, it is an established principle that federal courts of appeals lack the power to review sentences, whether at the instance of the defendant or the prosecution. The Government now claims that sleeping within § 2106 there has been a pervasive power of federal appellate courts to set aside lawful sentences.

While the Government makes this argument in a case involving a conviction on multiple counts, there is nothing in the argument that confines it to that setting. If a court of appeals can upset one of two lawful sentences under § 2106, the power asserted is applicable to any lawful sentence.

The Third Circuit, presumably well aware of § 2106, did not rest its order on this section. The Court of Appeals based its order entirely on *United States v. Busic, supra*, without recognizing that *Busic* involved the problem of a single offense having been fragmented illegally into multiple counts.[2] The § 2106 argument is a belated idea raised by the Government for the first time in this Court.

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2. Contrary to the assertion of the Government (Brief in Opposition pp. 3, 6 n. 5), the Court of Appeals did not vacate the lawful

3. The Government joins with the Third Circuit in construing this Court's decision in *DiFrancesco* as a revolutionary shift in the law of double jeopardy. Petitioner maintains, as set forth in his petition, that *DiFrancesco* upheld a narrowly drawn statute that authorized government appeal from sentence in one specific offense. The Government does not argue that the prosecution could have taken an appeal from the sentence imposed on petitioner under the § 1014 count. Rather the Government believes that it can have a backhanded appeal on sentence when a defendant has appealed on the merits of a conviction. Punishing an appellant for taking an appeal raises the most serious question under the Double Jeopardy Clause. Nothing that *DiFrancesco* held or implied supports a conclusion that the Constitution is satisfied when this occurs.

The Third Circuit stands alone in its heretical view of the Double Jeopardy Clause. The Government asserts that the Second Circuit has also changed its position. In the case cited by the Government, the Second Circuit explicitly *refused* to change its position.[3] *McClain v. United States, supra,* at 913. Moreover, as we have previously noted, *McClain* is one of the recent cases in which a single bank robbery offense was fragmented into multiple counts on which the trial court had imposed consecutive prison terms. No other court of appeals has agreed with the Third Circuit's interpretation of the Double Jeopardy Clause. Every other court of appeals that has decided the

2. (Cont'd.)

sentence imposed on the conviction under 18 U. S. C. § 1014. The limited Third Circuit order may indicate that the Court of Appeals sensed a difference between this case and *Busic*.

3. The Second Circuit took note of the argument that *DiFrancesco* "sheds new light" on the rules for finality of sentences under the Double Jeopardy Clause and may have made prior decisions "less authoritative precedents than they theretofore had been," but the Court of Appeals said: "We need not, however, concern ourselves with that question at the present time." 643 F. 2d at 913.

question has disagreed with the Third Circuit. The present conflict among the circuits is patent.

4. The interests of justice and judicial economy, cited by the Government as reasons for this Court to delay decision, point exactly in the opposite direction. Nothing will be served, except confusion and mismanagement of scarce judicial resources, by waiting for further developments in the lower courts. The issue, clearly drawn, is essentially a question of law. Further litigation in other factual settings is neither required nor useful to prepare for a principled resolution of this significant constitutional question by this Court.

Delay, on the other hand, will be extremely harmful in terms of judicial economy. Criminal cases move through the courts of appeals in very large numbers. On a matter so fundamental as the power of an appellate court to review a lawful sentence, the potential impact is enormous. A delayed decision, made at some future time, will affect not only cases then moving through the system of justice, but will give rise to potential postconviction litigation by a great many others adversely affected. The factor of judicial economy supports the petition for the earliest consideration and authoritative resolution of this issue.

An even more compelling argument for immediate action by this Court is raised by concern for the interests of justice. With the chill caused by the Third Circuit decision, defendants and their counsel will not know how to proceed with regard to appeals. Undoubtedly, petitioner would not have taken an appeal on the merits of the conviction under § 1014 if he had known—or even suspected—that the Third Circuit would hold it had the power to affirm on the merits and, further, to upset the sentence. In football vernacular, petitioner was "blindsided." What occurred to petitioner in this case undermines the right to appeal. If, as petitioner contends, that chill is caused by the Third Circuit's misinterpretation of the Fifth Amendment, serious and deep injury will be done to the interests of justice. Even if petitioner is wrong,

litigants are entitled to know the limits on double jeopardy protection. The question should not be left dangling in uncertainty.

5. What has just been said largely disposes of the Government's argument that this case is not yet ripe for review. If the Government had wished, it could have informed this Court that it would not accept the Third Circuit's invitation to move to have petitioner's sentence increased. The Government's silence indicates what is almost foregone, that every effort will be made to use the opening created by the Court of Appeals. The attitude of the District Court is also revealed. Even before the Third Circuit could issue its mandate, the District Court ordered the parties to appear for resentencing. Only the timely petition for certiorari compelled the court to cancel its scheduled hearing. The orders are attached hereto as Appendix A, *infra*. Given the exigencies, it is much less than candid for the Government to assert that the issue is not ripe for decision.

6. The Government insists upon its Alice-in-Wonderland reading of 18 U. S. C. § 1014. Unable to avoid petitioner's argument that an "advance" under that section is a consensual transaction for the furnishing of money in expectation of reimbursement, the Government blithely asserts that § 1014 means: If *A* receives funds from a bank, which has no expectation of reimbursement from *A*, but which does expect reimbursement from anyone else, the bank has made an "advance" to *A*. Only Lewis Carroll would be proud of such a feat of logic. Moreover, the Government's illogic, unembarrassed by the fact that the case was not tried on any such theory, fails to fit the facts. The bank in this case expected reimbursement from no one, since it immediately charged the existing account of the Japanese bank with the amount transferred.

The United States Brief in Opposition contains no valid arguments against the timeliness of review by this Court. The Government does not contend that the issue

is not sufficiently important to merit consideration. Petitioner submits that the writ of certiorari should be issued.

Respectfully submitted,

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Philadelphia, PA 19107
Counsel for Petitioner

August 1981

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATE NOTICE MAILED 4-22-81

(4-30-81)
CANCELLED

CRIMINAL NO. 79-133

UNITED STATES OF AMERICA

v.

BIAGO PINTO

TAKE NOTICE that the above entitled case has set for RE-SENTENCING in Courtroom 12-A, United States District Court, 6th & Market St., Phila., Pa. 19106, on MONDAY, MAY 18, 1981, at 9:30 AM, before the Honorable Daniel H. Huyett, 3rd.

All defendants are directed to report to the courtroom on the date and time indicated above. If a defendant fails to appear as directed, the bail may be forfeited and a bench warrant issued.

If a defendant is presently in jail, the defendant or his counsel shall notify the undersigned in writing immediately so that the necessary procedures can be taken to have the defendant present in court.

Very truly yours,

FRANCIS E. DEVINE
Francis E. DeVine, Deputy Clerk
12614 U. S. Courthouse
Phila., Pa. 19106
Telephone: 215-597-9647